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Testimony of

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Hearing on the Individual and Employer Mandates in the Democrats' Health Care Law

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Thank you Mr. Chairman and members of the committee,

"If men were angels, no government would be necessary."

We've all heard this famous quote from James Madison in Federalist 51, but rarely do we hear the rest of the quote even though it is absolutely crucial.

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

I submit that the Patient Protection and Affordable Care Act is precisely the type of uncontrolled exercise of government power that Madison and the founders recognized as a fundamental threat to our liberties.

Having just fought and won a revolution against a despotic central government, the framers of our Constitution were not about to tolerate the least slide back to tyranny. So they divided government power among three branches and they were particularly careful to limit the legislative authority to a specific list of powers and no more.

In its findings accompanying the PPACA, Congress exclusively and explicitly invoked its power to "regulate Commerce … among the several States" as its purported constitutional authority for the Individual Mandate.

It was wrong for three major reasons.

First, the administration's expansive interpretation goes against two hundred years of history and all Supreme Court precedent.

As both the Congressional Research Service and the Congressional Budget Office have observed, the PPACA is entirely without precedent insofar as it mandates individuals to enter a stream of commerce. The fact that, over the course of two centuries, Congress never used this purported power to compel purchases,

suggests that Congress never has understood itself to have this power in the first place. For example, at the height of World War II, the federal government did not compel Americans to buy war bonds, even when our national survival was at stake.

The administration's go-to case, in fact, came out of the World War II era, but involved a much more modest claim of federal power than does the PPACA. In the 1942 case of *Wickard v. Filburn* the Court articulated a very broad rule allowing Congress to regulate even intrastate activity if that activity, in the aggregate, exerted a "substantial economic effect" on the interstate economy. But in *Wickard* the question was whether a commercial farmer growing wheat to feed his livestock could still be regulated under the laws that capped his production of wheat for sale. Whether one agrees or disagrees with that decision, Filburn at least had the ability to avoid falling under those regulations simply by getting out of the wheat production business altogether.

The administration's other go-to case, *Gonzales v. Raich*, has a similar problem. There, the government was regulating the interstate marijuana market, and swept in home-grown medical marijuana as part of its broader criminalization efforts. But the plaintiffs in that case were at least engaging in an activity that can be regulated, indeed, rendered illegal, and they could have left the marijuana market in the same way that Filburn could have left the wheat market.

In the case of the PPACA, individuals engaged in *no activity whatsoever* are subject to the Individual Mandate and have no way to avoid the compulsion to enter the health insurance market. A more apt analogy to the regulation in *Wickard* would be a "Wheat Mandate" that forced every American to buy a government-prescribed amount of wheat or pay a penalty. This would be a more effective means of raising wheat prices than the regulation at issue in *Wickard*. It also would share the features the government relies upon to defend the mandate. The vast majority of Americans participate in the wheat market in some form just as the vast majority of Americans participate in the health insurance market. Gains to farmers from

boosting wheat prices under a wheat mandate could be used to offset their costs in fulfilling a moral obligation to provide food for the hungry, just as the increased revenues to insurance companies from forcing more people to buy insurance are designed to offset insurers' losses by being required to offer insurance at otherwise unsustainably-low prices.

If the federal government had the power to compel individuals to purchase products, it would not have resorted to so many roundabout methods to support industries and inflate the prices of certain products as it has done repeatedly over the last century. Historically Congress has induced purchases through tax incentives or by conditioning other government benefits on purchases. If the administration's position is correct in this case, these workarounds were clumsy and inefficient solutions to a problem Congress could have more easily solved by directly compelling purchases. Instead of instituting a complicated and expensive government bailout of General Motors, Congress could simply have required Americans to purchase GM cars as a form of patriotic duty. Instead of offering incentives like Cash for Clunkers or tax credits for energy-efficient home improvements, Congress could have required individuals owning non-energy-efficient vehicles or homes to exchange or upgrade them.

If the government truly had this simple and direct way of achieving its goals, it would have exercised it long ago, and for emergencies far more pressing than health care reform.

A second error of the administration's expansive reading of the Commerce Clause is that compelling commerce simply isn't the same as regulating commerce.

Even under the Supreme Court's broadest reading of the Commerce Clause, no law and no case has yet attempted to compel individuals to enter a market under the guise of "regulating" that market.

Dictionaries from the Framers' era clearly define the term "regulate" in terms that do not include compelling activity, just as dictionaries of today. Rather, they all refer to the object of regulation as a preexisting – not potential – activity. As a result, government's broad interpretation of the Commerce Clause just doesn't make linguistic sense.

In fact, PPACA's individual mandate is just that: a mandate, a command, not a "regulation" in any sense of the word. To hold otherwise is to stretch the language of the Commerce Clause beyond the breaking point.

This is why the administration struggles mightily to elide the distinction between regulating activity and compelling activity. It intentionally blurs, for example, the critical difference between individuals who are actual participants in the health insurance market and those who are merely potential participants.

The administration likewise blurs the distinction between the market for health insurance and the much broader market for health care itself. It argues that because most Americans are or will be part of the market for health *care*, all Americans can be forced to buy health *insurance* that would cover such care. This approximation may be "good enough for government work," but it is not "good enough" for the Constitution.

There are numerous other markets in which most Americans participate and which carry the same or greater moral obligations that accompany the provision of health care. Although individuals all may need food, clothing, and shelter, the government cannot simply mandate that Americans purchase even these necessities.

The third problem with the administration's expansive interpretation of the Commerce Clause is that it lacks any limiting principle.

The Supreme Court's Commerce Clause jurisprudence has emphasized that government's power must have a stopping point to be constitutional, precisely because the Court recognizes the structural limits on our government as the preeminent constitutional guarantee of individual liberty.

The limiting principle relied upon by the administration seems to boil down to a claim that "health care is just different." But, as I have explained, the market for health insurance – or even health care – is not unique. And even if it were, expanding the Commerce Clause so dramatically in that market alone is hardly a limiting principle. It is an appeal to ad-hoc and arbitrary rule making.

If the federal government can force Americans to purchase health insurance to lower national health care costs, there is no reason it cannot require other purchases to lower those costs as well. We have all heard talk of "broccoli mandates" and compelled gym memberships and, while these sound extreme, there is nothing stopping Congress from passing such a law on the administration's view of the Commerce Clause. The best it can do is to say that politics would never allow such laws to be passed. While this may be true for the moment, political moods are notoriously fickle, which is why the Framers chose a system of enumerated and divided powers as the primary means of checking the coercive force of the government, notwithstanding what 51% of the electorate may say at any given moment.

But if, contrary to the Framers' vision, the administration's position is adopted by the Supreme Court, the only limit on the power of government will be the power of imagination.

Given the weaknesses of its Commerce Clause arguments, the administration has hedged its bets by emphasizing the Necessary and Proper Clause in its most recent briefs.

Because the administration's Commerce Clause arguments have received mixed reviews from the lower and intermediate courts, it has dedicated significant space in recent briefing to an alternative argument in support of PPACA. It argues that the Individual Mandate is a "necessary and proper" corollary of overall health care reform. In so doing, the administration makes a string of stunning concessions about the harms that core provisions that PPACA, standing alone, would impose. The administration acknowledges that, if deprived of the overwhelming firepower of the Individual Mandate, PPACA would "create a spiral of higher costs and reduced coverage because individuals can wait to enroll until they are sick."[1] The administration further warns that the PPACA in the absence of the Individual Mandate, would likely "lead to a death spiral of individual insurance."[2] The Mandate, therefore, is necessary and proper to executing the PPACA, according to the administration.

But the Necessary and Proper Clause is not a free-standing or roving grant of power. It merely gives Congress the authority "[t]o make all Laws which shall be necessary and proper *for carrying into Execution*" its other enumerated powers. (emphasis added.) For example, Congress has the power to lay and collect taxes. In order to execute that power, it also needs the authority to hire people to collect those taxes in the form of the IRS, to construct a building to house tax collectors, to print and distribute tax forms, etc.

But the government power under the Necessary and Proper Clause, like the Commerce Clause, must have a limit to be constitutional. The key limit surpassed in this case is that this Clause can only authorize laws that are necessary to the *execution* of the other powers. The Mandate, quite simply, does not execute or implement any other enumerated power and therefore cannot be used as a basis for the PPACA's constitutionality.

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[1] Petrs. Br. at 18.
[2] Petrs. Br. at 30.

Although the Mandate may preserve a health insurance industry that – by the administration's own admission – would otherwise be destroyed by the PPACA's core provisions, the Mandate does not *carry into execution* those provisions, it *averts the harmful consequences* of these constitutionally legitimate provisions.

The theory here runs into a limiting-principle problem worse than that associated with the Commerce Clause. Under the administration's analysis, Congress would be free to act whenever it believes a legitimate statute carries harmful policy implications with it. By extension, the more damaging a statute's provisions, the more power Congress has to pass essential or necessary "fixes" that would otherwise be unconstitutional. This is the epitome of boot-strapping. Indeed, it is not unlike a plaintiff in a case arguing for standing based on the costs-incurred in bringing the lawsuit.

Further the administration's position actually incentivizes poorly-conceived and sloppily-drafted statutes because the greater the harm caused by a piece of legislation, the more power Congress could claim in order to fix the self-created harms.

As Members of Congress, you have taken an oath to uphold the Constitution of the United States. You thus bear an independent responsibility to ensure that the Legislative Branch stays within its constitutionally enumerated powers. To once again summon Madison, because government is not made up of angels, external and internal controls on government power are absolutely crucial. Because PPACA's Mandate removes several fundamental restraints on government power, it should be deemed unconstitutional by both you and the Supreme Court.